No. 82-1766

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

SECURITIES INDUSTRY ASSOCIATION,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

A. G. BECKER INCORPORATED,
Petitioner,

v.

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE INVESTMENT COMPANY INSTITUTE, *AMICUS CURIAE* IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Did the majority below err in sustaining a ruling by the Board of Governors of the Federal Reserve System (the "Board") that allows banks to underwrite "commercial paper"—which is to say, short-term corporate notes—in the face of the Glass-Steagall Act's express prohibition against banks' underwriting "notes, or other securities"? * The Investment Company Institute ("the Institute") as *amicus curiae* answers "yes."

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*§ 21, 12 U.S.C. § 378(a)(1); *see also* § 16, 12 U.S.C. § 24 (Seventh).

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The Investment Company Institute (the "Institute"), *amicus curiae,* files this brief in support of the Petitioners' prayer that the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered on November 2, 1982, be reversed.[1]

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[1] This brief on behalf of the Institute is filed with the written consent of all the parties. *See* Letter dated November 14, 1983 from James B. Weidner, Esq., to Matthew P. Fink; Letter dated November 14, 1983 from Harvey L. Pitt, Esq., to Matthew P. Fink; and Letter dated November 4, 1983 from Solicitor General Rex E. Lee, Esq., to Matthew P. Fink, all filed with this Brief.

INTEREST OF THE INVESTMENT COMPANY INSTITUTE

The Institute is the national association of open-end investment companies (commonly known as mutual funds), their investment advisers and their principal underwriters. The Institute has 884 investment company members, with approximately 16 million shareholders and assets of approximately $264.5 billion. The Institute is generally recognized as the primary spokesman for the mutual fund industry and, as such, has been intimately involved over the years in numerous judicial and administrative proceedings with respect to the scope and application of the Glass-Steagall Act, including two cases decided by this Court. *See Board of Governors of the Federal Reserve System* v. *Investment Company Institute,* 450 U.S. 46 (1981) ("Board of Governors"); *Investment Company Institute* v. *Camp,* 401 U.S. 617 (1971) ("Camp").

The Institute has a substantial interest in this case because its members are directly and adversely affected by the unprecedented interpretation of the Glass-Steagall Act announced by a divided panel of the court below.[2] Although the members of the Institute do not underwrite commercial paper, they are concerned that the language and rationale of the majority opinion will be applied to authorize incursions by banks into other areas of the securities business forbidden to them by Congress exactly fifty years ago. There are already indications that this concern is well-founded. *See* Joint Petition for Writ of Certiorari at 11-12.[3]

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[2] At least since *Association of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970), there can be no doubt that the Institute would have had standing below even as a party. The Court there held that a trade organization's competitive position gave it standing to challenge a ruling of the Comptroller of the Currency that national banks could make data processing services available to their customers and to other banks. Indeed, in *Camp,* this Court applied *Data Processing* to hold squarely that the Institute and its members have standing to challenge interpretations of the Glass-Steagall Act issued by the banking regulators. *See Camp, supra,* 401 U.S. at 620-621.

[3] Specifically, the Comptroller of the Currency recently issued a ruling authorizing national banks to create mutual funds and to mass-market shares

(footnote continues)

The members of the Institute are further aggrieved by the majority's delegation of authority to the federal banking regulators to "adapt" the Glass-Steagall Act on a "case-by-case basis" to the regulators' view of "current business reality" (J.A. 228). In 1933, Congress determined that it was necessary to effect the divorcement of commercial and investment banking and proceeded to enact separate but intertwined statutory schemes to govern and regulate each industry. No administrative agency possesses the authority to question the Congressional judgment to separate commercial from investment banking, and the delicate interrelationship between Glass-Steagall and the securities laws confirms that no administrative agency possesses the expertise necessary to rework Congress' legal and regulatory superstructure. The Institute believes that the difficult issues of fair competition, concentration of economic power, and investor protection raised by any adjustment of the statutory framework are issues that must be addressed by Congress, and by Congress alone.

Finally, the Institute submits this brief because its members possess a perspective upon the issues before this Court that is not shared by the parties to this case. Quite apart from the Institute's experience with the Glass-Steagall Act, its members are acknowledged experts in the buying, holding and selling of commercial paper. Indeed, its money market fund members alone own approximately 28% of all the commercial paper outstanding in the United States. Through their experience in the commercial paper market, the Institute's members have acquired a unique appreciation of the risks inherent in the

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(footnote continued)

in the funds to the 111 million members of the nation's workforce as investments for their Individual Retirement Accounts, even though this Court squarely held in *Camp* that bank operation of a mutual fund is unlawful because it involves banks "in the underwriting, issuing, selling, and distributing of securities in violation of §§ 16 and 21 of the Glass-Steagall Act." *Camp, supra,* 401 U.S. at 639. During the course of the ensuing litigation challenging the Comptroller's ruling, the Comptroller has attempted to justify his defiance of *Camp* by relying upon the majority opinion below. *See* Reply Brief in Support of Joint Petition for Writ of Certiorari at 2 n.1.

purchase and sale of commercial paper, issues squarely raised by the majority decision below.[4]

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit (J.A. 220-257) [5] is reported at 693 F.2d 136. The decisions of the Court of Appeals for the District of Columbia Circuit denying, by a split vote, a joint petition for rehearing (J.A. 258) and suggestion for rehearing *en banc* (J.A. 260) are unreported.

The opinion of the United States District Court for the District of Columbia granting summary judgment in favor of petitioners (J.A. 194-219) is reported at 519 F. Supp. 602. The administrative determination of the Board of Governors of the Federal Reserve System ("Board") in response to petitions by A. G. Becker Incorporated and the SIA (J.A. 122-143) is unreported, and the Board's subsequent "Policy Statement Concerning the Sale of Third Party Commercial Paper by State Member Banks" (J.A. 183-189) is reported at 46 Fed. Reg. 2933 (June 1, 1981).

JURISDICTION

The judgment of the Court of Appeals for the District of Columbia Circuit was entered on November 2, 1982. A timely petition for a writ of certiorari was filed on April 29, 1983, and was granted on October 3, 1983. The Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

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[4] This Court's decision in *Burks* v. *Lasker*, 441 U.S. 471 (1979), arose out of a suit brought by a mutual fund shareholder against the fund's investment adviser to recover losses sustained by the fund when $20 million in "prime quality" Penn Central commercial paper owned by the fund had declined dramatically in value upon Penn Central's bankruptcy. *See id.* at 473-475.

[5] Citations herein to material printed in the Joint Appendix appear as "J.A. ."

STATUTES INVOLVED

Involved in these actions are two sections of the Glass-Steagall Act.[6] Section 16 of the Act provides, in part:

> [A national bank] shall not underwrite any issue of securities or stock; * * *.

12 U.S.C. § 24 (Seventh) (Supp. 1982). Section 21 of the Act provides, in part:

> [I]t shall be unlawful * * * [f]or any person, firm, corporation, association, business trust, or other similar organization, engaged in the business of issuing, underwriting, selling, or distributing, at wholesale or retail, or through syndicate participation, stocks, bonds, debentures, notes, or other securities, to engage at the same time to any extent whatever in the business of receiving deposits subject to check or to repayment upon presentation of a passbook, certificate of deposit, or other evidence of debt, or upon request of the depositor * * *.

12 U.S.C. § 378(a)(1).

STATEMENT OF THE CASE

The Institute adopts the Statement of the Case presented in the Briefs of Petitioners A. G. Becker Incorporated and the Securities Industry Association.

SUMMARY OF ARGUMENT

I. The reference in the Glass-Steagall Act to "stocks, bonds, debentures, notes, or other securities" is so categorical and all-encompassing that the Court of Appeals' decision

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[6] What is generally known as the Glass-Steagall Act was enacted as part of the Banking Act of 1933, 48 Stat. 162, and is codified in various sections of Title 12 of the United States Code. Relevant to this action are §§ 16 and 21 of the Act, 12 U.S.C. §§ 24 (Seventh) and 378. The terms of § 16, which expressly apply to national banks, are also made applicable to state member banks of the Federal Reserve System, such as Bankers Trust Company, by 12 U.S.C. § 335.

permitting banks to underwrite commercial paper contravenes the "plain meaning" of the Glass-Steagall Act. This is clear from (1) the face of the statute, (2) the absence of any legislative history to the contrary, (3) the absence of any statutory grant of rule-making authority to the Board (or any other banking agency), (4) this Court's repeated admonitions that the Glass-Steagall prohibitions are not to be accorded a narrow or technical meaning, and (5) the contrast between the categorical imperative of the Glass-Steagall Act and the extreme flexibility of the federal securities statutes.

II. For many of the same reasons—and because the term "note" here is not found in an administrative *rule* but is a statutory term central to the entire application of the Act—the Board's administrative construction is entitled to little deference.

III. It is particularly inappropriate to permit the Board to unsettle decades of "plain meaning" construction of the Glass-Steagall Act in view of Congress' steadfast and repeated refusal over the years to jettison the Act or to alter the philosophy it embodies. This is especially true in light of the effect of permitting the Board to do so; for any expansion of bank securities activities necessarily unbalances the regulatory scheme Congress crafted when, in reliance upon the Glass-Steagall Act, it excluded banks from the definitions of "broker" and "dealer" in the Securities Exchange Act of 1934. The realignment of the commercial banking and securities industries is a matter for the Legislative Branch.

IV. The majority opinion below contravenes the Glass-Steagall Act in concluding that commercial paper does not fall within the term "securities." Even if it were assumed, as the Board argues, that it is appropriate to construe the statutory language by means of a "functional analysis," the analysis must focus upon the *role* of the bank in the transaction at issue. The bank's role as a *marketer* or *promoter* of commercial paper is very different from its traditional role as a *buyer* of commercial paper, where it is simply engaged in the traditional banking function of making a loan. The bank's function here confirms that commercial paper is a Glass-Steagall "security."

ARGUMENT

I. THE DECISION BELOW CONTRAVENES THE "PLAIN MEANING" OF THE GLASS-STEAGALL ACT

There is no single rule of statutory construction. We are quite cognizant of Judge Learned Hand's warning "not to make a fortress out of the dictionary,"[7] and of the oft quoted bit of Holmesiana: "A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used."[8]

At the same time, the Court has declared in at least nine cases in the securities field alone during the last few years that "analysis must begin with the language of the statute itself."[9] And the Court's adherence to the statutory language has been even more insistent in construing the Glass-Steagall Act. There the Court has instructed that the judicial task is to apply "the literal terms"[10] of the Act "as they were written."[11] Indeed, the Court only recently reminded that the courts must rely "squarely on the literal language of §§ 16 and 21 of the Glass-Steagall Act" and must enforce the Act strictly when "the statutory language plainly applie[s]."[12]

There is no gainsaying that every statute falls somewhere on the continuum between the "plain meaning" and the "statutory purpose" (or, as the Board would have it, the "functional") approaches to statutory construction. In *Camp*, however, this Court decided that the Glass-Steagall Act falls at

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[7] *Cabell* v. *Markham*, 148 F. 2d 737, 739 (2d Cir.), *aff'd*, 326 U.S. 404 (1945).

[8] *Towne* v. *Eisner*, 245 U.S. 418, 425 (1918).

[9] *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 197 (1976); *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 24 (1977); *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 472 (1977); *SEC* v. *Sloan*, 436 U.S. 103, 111 (1978); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11,16 (1979); *Chiarella* v. *United States*, 445 U.S. 222,226 (1980); *Steadman* v. *SEC*, U.S. 91,97 (1981); *see also Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring);

[10] *Camp, supra*, 401 U.S. at 639.

[11] *Id.*

[12] *Board of Governors, supra*, 450 U.S. at 65.

the "plain meaning" end of the continuum. And we suggest for a number of reasons that the case at Bar confirms the wisdom of that decision.

First: It would be difficult to think of anything plainer on its face, as a matter of simple English, than § 21's foreclosure to commercial banks of the business "of issuing, underwriting, selling, or distributing * * * stocks, bonds, debentures, notes, or other securities." Moreover, the reach of § 16 is coextensive with that of § 21.[13] Given the clear and all-encompassing statutory language, one does not have to be a confirmed literalist to suggest that language so plain puts a severe burden on those who would turn the textual white into the "functional" black by reading a huge congeries of "notes" out of the statute.

Second: Even on the assumption *arguendo* that the face of the statute is sufficiently ambiguous to warrant recourse to the legislative history of the Glass-Steagall Act, it is fair to say that the search is fruitless. The Board concedes that "there is no direct evidence in the legislative history of the Glass-Steagall Act on the status of commercial paper under the Act" (J.A. 133).[14]

There is, nevertheless, compelling evidence that Congress intended the statutory language to encompass commercial paper. During floor consideration of the bill that became the Securities Act of 1933, Senator Glass, supported by the Federal Reserve Board, expressed concern over the fact that the proposed definition of the term "security"—which included "any note"—would encompass commercial paper. Accordingly, he proposed (in the Board's words) that "short-term notes, in-

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[13] *A. G. Becker Incorporated* v. *Board of Governors of the Federal Reserve System*, 519 F. Supp. 602, 613-613 (D.D.C. 1981), *rev'd on other grounds*, 693 F.2d 136 (D.C. Cir. 1982). It is noteworthy in this regard that, despite minor language differences in the definition of the term "securities" contained in the Securities Act of 1933 and the Securities Exchange Act of 1934, this Court also has construed those definitions together. *See, e.g., United Housing Foundation, Inc.*, v. *Forman*, 421 U.S. 837, 848 n. 12 (1975); *Tcherepnin* v. *Knight*, 389 U.S. 332, 336, 342 (1967).

[14] The evidence adduced by the majority below is anything but direct. *A. G. Becker Incorporated* v. *Board of Governors of the Federal Reserve System*, 693 F.2d 136, 144-146 (D.C. Cir. 1982) (J.A. 236-238).

cluding '9 months' commercial paper,' be excluded from the definition of securities contained in that bill" (J.A. 133).

Congress, however, refused to adopt the proposed amendment. Instead, it merely exempted some forms of commercial paper from the *registration* requirements of the Securities Act,[15] leaving untouched the status of all commercial paper as securities,[16] and leaving intact the application of the antifraud provisions of the Securities Act to the purchase and sale of all commercial paper "securities."[17] The battle having been lost once, when the same committees of the same Congress considered the Glass-Steagall Act three weeks later, no one, including Senator Glass and the Board, sought to amend the word "notes" or "securities" to exclude commercial paper from the class of corporate instruments that the Glass-Steagall Act forbids commercial banks to sell, distribute, deal in or underwrite.

Third: The terms of the statute should be applied, in the Court's words, "as they were written,"[18] because Congress expressly has refused to provide the Board with any definitional rulemaking authority. In contrast to the Bank Holding Company Act, 12 U.S.C. §§ 1841, *et seq.*, which vests rulemaking authority in the Board to define, and to authorize bank holding companies to engage in, activities that the Board considers to be "so closely related to banking as to be a proper incident thereto"—as well as the provisions in five of the six securities

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[15] *See* §§ 3(a)(3), 5, 15 U.S.C. §§ 77c(a)(3), 77e.

[16] *See* H.R. Rep. No. 85, 73d Cong., 1st Sess. 14 (1933) (§ 3(a) "lists securities that are exempt * * *.")

[17] *See* §§ 12(2), 17(c), 15 U.S.C. §§ 771(2), 77q(c); *see also* the remarks of Senator Adams in *Hearings on S. 875 before the Senate Com. on Banking & Currency*, 73d Cong., 1st Sess. 234 (1933): "You would recognize the propriety, would you not, of the fraud sections being made applicable even to commercial paper? In other words, you have in Chicago, as you know, note brokers * * *. And if one of those note brokers, some intermediary, should misuse these things, misuse the mails, I take it you would concede it would be proper to provide for prosecution of them, even though you do not think he should be required to make a registration of these securities."

[18] *Camp*, *supra*, 401 U.S. at 639.

statutes authorizing the SEC to define "accounting, technical, and trade terms" used in the statutes[19]—the Glass-Steagall Act contains only flat prohibitions with no rulemaking flexibility.

This denial of authority to the Board was not for lack of rulemaking proposals, both when the statute was originally enacted and on several occasions since. *See* Joint Petition for Writ of Certiorari at 24-26. Indeed, Congress only recently reaffirmed its opposition to vesting such authority in the banking agencies in enacting the Depository Institutions Deregulation and Monetary Control Act of 1980, 94 Stat. 132, where it authorized the Comptroller of the Currency to adopt rules to "carry out the responsibilities of the office" but expressly negated any rulemaking authority with respect to "securities activities of National Banks under * * * the Glass-Steagall Act." 12 U.S.C. § 93a.

To be sure, the Board purports to have proceeded here by way of "interpretation" rather than rules. But the error in this assertion is betrayed both by (1) the lack of any relationship between the Board's interpretation ("long-term, speculative debt instruments with maturities of greater than 270 days sold to sophisticated institutional investors and used for raising capital as part of the permanent financial structure of a corporation") and the statutory language ("notes"), and (2) the elaborate "guidelines" promulgated by the Board in an attempt to "minimize" the unsafe and unsound banking practices that the Board conceded would flow from the commercial paper underwriting activity it had authorized (J.A. 185-189).

Fourth: The applicability of the "plain meaning" approach is also implicit in this Court's admonition, *in every case that has construed the Glass-Steagall Act,* that its prohibitions are not to

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[19] Securities Act of 1933, § 19(a), 15 U.S.C. § 77s(a); Securities Exchange Act of 1934, §§ 3(b), 23(a), 15 U.S.C. §§ 78c(b), 78w(a); Public Utility Holding Company Act of 1935, § 20, 15 U.S.C. § 79t; Trust Indenture Act of 1939, § 319(a), (b), 15 U.S.C. §§ 77sss(a), (b); Investment Company Act of 1940, §§ 38(a), 39, 15 U.S.C. §§ 80a-37(a), 38. These provisions are in addition to the general rulemaking authority in all six statutes to adopt such rules as may be necessary to carry out the Commission's statutory functions. *Id.;* Investment Advisers Act of 1940, § 211(a), (b), 15 U.S.C. § 80b-11(a), (b). Moreover, numerous *exemptive* powers are scattered throughout the statutes. See 1 American Law Institute, *Federal Securities Code* 237 (1980), source note to § 303(c), which enumerates no fewer than 28 instances.

be accorded a narrow or technical meaning.[20] In construing the very term "securities" as used in the Act, the Court has stated that

> there is nothing in the phrasing of either §16 or § 21 that suggests a narrow reading of the word "securities." To the contrary, the breadth of the term is implicit in the fact that the antecedent statutory language encompasses not only equity securities but also securities representing debt.

Camp, supra, 401 U.S. at 635.

Fifth: The "plain meaning" approach to the Glass-Steagall Act is demonstrated also by a comparison of that Act and the Securities Act of 1933. The definitional section of the Securities Act is introduced by the phrase, "unless the context otherwise requires." § 2(1), 15 U.S.C. § 77b(1). *See SEC* v. *C.M. Joiner Leasing Corp.,* 320 U.S. 344, 350-51 (1943); *SEC* v. *National Securities, Inc.,* 393 U.S. 453, 466 (1969); *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 848. It is by relying upon this language that some courts have held that not all notes are "securities" within the Securities Act of 1933, notwithstanding the fact that the Securities Act definition of the term "securities" includes "any note."[21] By contrast, even though Congress invited the Board and the courts to consider whether "the context otherwise requires" in construing the terms of *other* banking statutes—the Savings & Loan Holding Company Act, for example[22]—Congress extended no such invitation *to anyone* in the Glass-Steagall Act. The statutory terms of the Glass-Steagall Act, including the term "notes," therefore must be applied "as they were written." *Camp, supra,* 401 U.S. at 639.

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[20] *Board of Governors of Federal Reserve System* v. *Agnew,* 329 U.S. 441, 450 (1947); *Camp, supra,* 401 U.S. at 635; *Board of Governors, supra,* 450 U.S. at 65; *see also Awotin* v. *Atlas Exchange National Bank,* 295 U.S. 209, 212 (1935) (construing the McFadden Act, 44 Stat. 1224 (1927), reenacted as part of the Glass-Steagall Act).

[21] 1933 Act § 2(1), 15 U.S.C. § 77b(1). For a collection of the cases and the several theories, see *SEC* v. *Diversified Industries, Inc.,* 465 F. Supp. 104 (D.D.C. 1979). *See also* L. Loss, *Fundamentals of Securities Regulation* 170, n. a (1983).

[22] *See, e.g.,* 12 U.S.C. § 1730a(a)(1). *See also* 12 U.S.C. § 1749bbb-2(a).

II. THE BOARD'S ADMINISTRATIVE CONSTRUCTION IS ENTITLED TO LITTLE DEFERENCE UNDER THE CIRCUMSTANCES

This second proposition is a corollary of [illegible]. And much of what has been said there with respect to the interpretative approach to the statute is just as cogent with respect to the degree of deference to be extended to the administrative interpretation of the Board.

First: The Board's construction, contravening, as it does, the plain language of the statute, is entitled to little respect, because the Board has failed to uncover any "clearly expressed legislative intention" that Congress did not intend its words to mean what they say. *See, e.g., American Tobacco Co.* v. *Patterson,* 456 U.S. 63, 68 (1982). As a result, talk of deference simply is "pointless." *FEC* v. *Democratic Senatorial Campaign Committee,* 454 U.S. 27, 31 (1981).[23]

Second: Another reason that the Board's interpretation is entitled to little deference is the nature of the term it has construed. This is not the case of an agency's interpretation of one of its own rules, where presumably it knows what it intended. There the administrative construction may be of "controlling weight unless it is plainly erroneous or inconsistent with the regulation."[24] This is a case involving the construction of a *statute,* where, as this Court only recently reminded, the "courts are the final authorities."[25]

Moreover, as a statutory term, the word "note" is not more or less peripheral. It is central to the entire application of the statute. And even a consistent and longstanding administrative

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[23] In that case, the Court agreed with the administrative construction. But this is not true of all the cases cited by the Court. *See, e.g., SEC* v. *Sloan,* 436 U.S. 103 (1978).

[24] *Bowles* v. *Seminole Rock & Sand Co.,* 325 U.S. 410, 414 (1945); *see also Udall* v. *Tallman,* 380 U.S. 1, 16-17 (1965). Even in that situation the Court more recently has said that the SEC's view of "materiality" for purposes of its proxy fraud rule was merely "entitled to consideration." *TSC Industries, Inc.* v. *Northway, Inc.,* 426 U.S. 438, 499 n. 10 (1976).

[25] *FEC* v. *Democratic Senatorial Campaign Committee, supra,* 454 U.S. at 32.

construction of such a term should not be entitled to great deference. The meaning of "note" does not require delving into such technical mysteries as the electronic marvels of bank clearing operations or the functions of stock exchange specialists—areas of the kind that might be expected to repel the bravest of judges in the face of an agency's special expertise. But the courts know what a bond is, what a stock is, what a note is, what commercial paper is.

On one ground or another, this Court did not defer to the SEC's construction of the equally central term, "security," in two of the last three cases under the securities laws involving that word. *United Housing Foundation, Inc.* v. *Forman, supra,* 421 U.S. at 858 n. 25; *International Brotherhood of Teamsters* v. *Daniel,* 439 U.S. 551, 565-566 (1979). Nor should it defer to the Board's construction here.

Third: In any event, the administrative construction here is anything but consistent and longstanding. The Board is not the SEC, which not only has to interpret hundreds of pages of rules but also has its staff issue thousands of interpretive "no action" letters every year. Quite apart from the fact that the Board's policy statement here at issue dates only from 1981 (J.A. 183), there has been only a relative handful of Board letters on §§ 16 and 21 generally during the entire life of the Glass-Steagall Act.

III. THIS IS A PARTICULARLY INAPPROPRIATE TIME FOR THE BOARD TO UNSETTLE FIFTY YEARS OF CONSTRUCTION OF THE BANKING AND SECURITIES LAWS IN VIEW OF THE CURRENT DEBATE IN CONGRESS ON THE ENTIRE GLASS-STEAGALL PHILOSOPHY

First: Perhaps the beat reason of all to stick to the unqualified language of the Act is that, although Congress in recent years has been actively reexamining the Glass-Steagall Act not only from many facets but also in its entirety, it steadfastly has refused to abandon the Act or to alter its complete divorcement philosophy. *See* Joint Petition for Writ

of Certiorari at 14. Thus, through a narrow construction of the Act's categorical language, the Board in effect has entered where Congress has refused to tread. Yet, as this Court recently has stated, policy decisions "must be implemented by Congress, and not by a crabbed interpretation of the words of a statute." *BankAmerica Corp.* v. *United States,* 103 S.Ct. 2266, 2273 (1983).

Second: Adherence to the plain statutory language is essential to preserve the careful balance Congress has constructed between the securities laws and the Glass-Steagall Act. The Securities Act of 1933 was enacted just three weeks before the Glass-Steagall Act; they both came out of the Senate Banking and Currency Committee; and President Roosevelt's 1933 message to Congress that led to passage of the Securities Act specifically noted the interrelationship by describing the Securities Act as "but one step in our broad purpose of protecting investors *and depositors.*" H.R. Rep. No. 85, 73d Cong., 1st Sess. 2 (1933) (italics supplied).[26]

This interrelationship extends to the Securities Exchange Act of 1934. Because Congress believed that the Glass-Steagall Act prohibited commercial banks from engaging in the securities business, Congress excluded banks from the definitions of the terms "broker" and "dealer" in the Securities Exchange Act.[27] This exclusion places them outside a comprehensive statutory scheme that starts with registration and extends to many kinds of regulation—both direct regulation by the SEC and self-regulation (under the aegis of the Commission) by the so-called "self regulatory organizations": the stock exchanges, the National Association of Securities Dealers, and the registered clearing agencies. *See generally* L. Loss, *supra,* c. 8B-D.

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[26] *Accord:* 77 Cong. Rec. 5896 (1933) (statement by Senator Luce that Glass-Steagall Act's "purpose is, by an extension revision of our banking laws, to furnish more protection to depositors and investors * * *"); *see also* Federal Reserve Board, *Commercial Bank Private Placement Activities; A Staff Study* 91 (June 1977) ("Glass-Steagall's concerns were not limited to the protection of investors * * *"); *see generally* Willis, *The Banking Act of 1933 in Operation,* 34 Colum. L. Rev. 697, 705 (1935).

[27] *See* § 3(a)(4), 3(a)(5), 15 U.S.C. §§ 78c(a)(4), 78c(a)(5). Mr. Thomas G. Corcoran, the Administration's spokesman, testified in the 1934 Senate committee hearings:

(footnote continues)

Under these circumstances, to permit the Board to disregard the plain language of the Glass-Steagall Act and to authorize banks to engage in the securities business would be an erosion of what Congress envisaged in § 2 of the Securities Exchange Act of 1934, 15 U.S.C. § 78b, as a scheme of "regulation and control [that would be] reasonably complete and effective." Moreover, it necessarily would undermine what the District Court termed in *Camp* "the complete regulatory scheme which the Congress enacted to mitigate the problems that the country faced in the 1930s." *Investment Company Institute* v. *Camp,* 274 F. Supp. 624, 642-643 (D.D.C. 1967), *rev'd,* 420 F.2d 83 (D.C.Cir. 1970), *rev'd,* 401 U.S. 617 (1971).

Indeed, administrative rulings such as that issued by the Board here have already prompted the SEC to embark on its own voyage of statutory exploration in an attempt to redress the resulting regulatory imbalance. For example, the SEC has thought it necessary to hold hearings on whether to require banks, notwithstanding their exclusion from the definitions of "broker" and "dealer," to register and submit to SEC regulation if they engage in certain securities activities. In the words of the SEC:

> The term "broker" and "dealer" are defined in the Securities Exchange Act of 1934 to exclude banks. The Exchange Act's definitions are preceded, however, by the phrase "unless the context otherwise

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(footnote continued)

> * * * there are plenty of other limitations on the banks. A bank cannot normally go in the business, like a broker, of dealing in securities * * *.
>
> * * *
>
> They are not allowed to do those things any longer, under the Glass-Steagall bill. They cannot go into a business of dealing in securities * * *.

Hearings on H.R. 7852 and H.R. 8720 before House Com. on Interstate & Foreign Commerce, 73d Cong., 2d Sess. 86 (1934). *See also* H.R. Rep. No. 123, 94th Cong., 1st Sess. 93 (1975): "Since 1934, banks have been excluded from the definition of 'broker' and 'dealer' under the Securities Exchange Act. It had been thought that the Glass-Steagall Act had effectively removed banks from the securities business."

> requires." The Commission will consider whether the context requires that the bank exclusion not be available if banks engage in * * * securities activities.[28]

And, on November 8, 1983, the SEC issued for public comment proposed rules which would require banks to register as broker-dealers.[29]

While the SEC is understandably trying to plug the regulatory gap created by the recent rulings of the banking regulators, all such *ad hoc* administrative adjustments provide a poor substitute for the carefully balanced statutory scheme created by Congress. If the present reciprocal relationship of the Glass-Steagall Act and the Securities Exchange Act of 1934 is to be disturbed, Congress, not the Board, is the proper body to evaluate and balance the complex considerations that an alteration of the statutory framework would entail.

Third: The Court's teaching in *International Brotherhood of Teamsters* v. *Daniel, supra,* 439 U.S. at 569-570, and *Marine Bank* v. *Weaver,* 455 U.S. 551, 560 n. 1 (1982), is instructive. There the Court referred to federal pension and banking regulation as reasons for holding that certain pension plan interest and bank certificates of deposit, respectively, were not "securities" within the SEC statutes. Here, conversely, a potential condition of *no* regulation—the fact that banks' underwriting activities would *not* be subject to federal regulation of the securities type by either the SEC or the Board—is reason for holding that short-term notes known as commercial paper *are* Glass-Steagall "securities."

Fourth: The "leave it to Congress" approach was determinative for the Second Circuit in deciding that certain custom-tailored promissory notes were not "securities" within the 1933 and 1934 securities statutes. *Exchange National Bank* v. *Touche Ross & Co.,* 544 F.2d 1126 (2d Cir. 1976). After giving a number of examples of notes that normally would not be "securities," Judge Friendly stated that "A more desirable solution would be for Congress to change the exclusions" from the "security" concept along the lines of The American Law

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[28] SEC Press Release, Oct. 19, 1983.

[29] 48 Fed. Reg. 51,930 (November 15, 1983).

Institute's *Federal Securities Code*. But, he went on, "So long as the statutes remain as they have been for over forty years, courts had better not depart from their words without strong support for the conviction that, under the authority vested in them by the 'context' clause, *they are doing what Congress wanted when they refuse to do what it said.*" 544 F.2d at 1138 (italics supplied).

That is the essence of our position. It is now fifty years since Glass-Steagall was placed in the statute book. And it is significant that during all that time, until 1978, it did not apparently occur to banks that they could underwrite third-party debt of any kind. There is simply no history making the underwriting of commercial paper a traditional banking function.

Just during its past term the Court preferred the "plain meaning" of § 8 of the Clayton Act, 15 U.S.C. § 19, to a Government interpretation that was at odds with the Government's failure for more than sixty years to exercise the power that it belatedly claimed. *BankAmerica Corp.* v. *United States, supra,* 103 S. Ct. at 2272; *see also International Brotherhood of Teamsters* v. *Daniel, supra,* 439 U.S. at 565-569. The same preference should attach here.

IV. THE MAJORITY OPINION CONTRAVENES THE GLASS-STEAGALL ACT IN PERMITTING BANKS TO UNDERWRITE SHORT-TERM COMMERCIAL PAPER AS NOT CONSTITUTING "SECURITIES"

Deprived of its "functional analysis" and "administrative deference" props, the Board's case has little left to it. And we shall not add to the Court's reading burden by repeating the more than adequate refutation in the Petitioners' Briefs. In endorsing that refutation, we shall confine ourselves to briefly emphasizing three points:

First: When the majority below blur the distinction between a bank's *buying* and its *marketing* or *promoting* commercial paper by considering the bank as being simply "on the other side of the transaction" in the former case, 693 F.2d at 150 (J.A. 246), we suggest, with respect, that they beg the question. For the critical difference between commercial and investment banking turns on the bank's *role,* not on the size or

riskiness of the transaction or the financial sophistication of the customer.[30]

When a bank *buys* commercial paper, it is in substance lending money to the maker of the note. Its revenue comes from the interest (or discount), and its sole concern is to assess the loan as a risk. On the other hand, when a bank *underwrites* the sale of another person's commercial paper, its role shifts from lender to marketer. Its revenue (normally an agent's commission) depends on its success in placing the paper. And all that is at risk is its reputation, together with potential civil liability, if one or more of its underwritten issues should turn sour as in the Penn Central case of recent memory.[31]

Moreover, banks' underwriting of commercial paper involves potentially both new conflicts of interest and new liabilities.

So far as new conflicts are concerned, consider the example of a bank that sells to Customer *X* paper issued by Customer *Y*, each of which may also have loans outstanding at the bank.

So far as new liabilities are concerned, § 12(2) of the Securities Act of 1933, 15 U.S.C. § 771(2), which makes sellers of securities liable to their buyers for misstatements in "a prospectus or oral communication" and specifically applies by its terms to commercial paper exempted from registration by § 3(a)(3), 15 U.S.C. § 77c(a)(3), is more strict than common law deceit in that § 12(2) does not require the plaintiff to prove scienter but imposes on the defendant the burden of going forward with a defense of due care.[32]

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[30] *See* Note, *A Conduct-Oriented Approach to the Glass-Steagall Act*, 91 Yale L.J. 102 (1981).

[31] *See* Staff Report of SEC to Special Subcom. on Investigations, H.R. Com. on Int. & For. Commerce, *The Financial Collapse of the Penn Central Company* (Subcom. Print 1972).

[32] Indeed, the Seventh Circuit has equated an underwriter's duty of care under § 12(2) with his duty with respect to a false registration statement under § 11, 15 U.S.C. § 77k. *Sanders* v. *John Nuveen & Co.*, 524 F.2d 1064 (7th Cir. 1975), *cert. denied*, 450 U.S. 1005 (1981). This holding may be questioned—particularly the court's reference to the defendant's failure to verify the audited financial statements or to review the auditor's work papers, since those steps are not required even to erect a defense under § 11(b)(3)(C). But obviously the Court is not going to decide that question in this case. And as long as a Circuit Court opinion is on the books, there is a real risk of substantial civil liability. On §§ 11 and 12(2), *see* L. Loss, *supra*, c. 10E.

Second: If the determining factors with respect to the existence of a Glass-Steagall security are size, riskiness and customer sophistication, what is to prevent the Board from extending its commercial paper reasoning to other debt instruments—say, prime quality corporate debentures and bonds —by pronouncing that they are not really "debentures" or "bonds"?

Third: Allowing the majority opinion to stand will almost inevitably encourage not only the Board but also the other federal bank regulators (the Comptroller of the Currency, the Federal Deposit Insurance Corporation, and the Federal Home Loan Bank Board) to permit a variety of securities activities previously understood to be barred to banks. At the very least, it will make it harder for all three agencies to resist the banks' strenuous pressure to dismantle the Glass-Steagall Act through administrative "interpretation." *See* Joint Petition for Writ of Certiorari at 15-16.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the District Court's declaratory judgment that the Board's ruling was contrary to law should be reinstated.

Respectfully submitted,

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